

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF COMMERCE

In the Matter of Scott Davis and
Joffree Taylor, individually and doing
business as J & S Construction

**FINDINGS OF FACT, CONCLUSIONS,
AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Barbara L. Neilson on March 10, 2005, at the Office of Administrative Hearings. The OAH record closed at the end of the hearing that day.

Michael J. Tostengard, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, MN 55101-2130, appeared on behalf of the Department of Commerce

Respondents Scott Davis and Joffree Taylor, J & S Construction, 327 North 4th Street, River Falls, WI 54022, appeared for themselves without counsel.

NOTICE

This Report is a recommendation, not a final decision. The Deputy Commissioner of Commerce will make the final decision after a review of the record. The Deputy Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Deputy Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Deputy Commissioner. Parties should contact Kevin M. Murphy, Deputy Commissioner, Minnesota Department of Commerce, 85 Seventh Place East, Suite 500, St. Paul, Minnesota 55101, telephone (651) 296-9411, to ascertain the procedure for filing exceptions or presenting argument to the Deputy Commissioner.

If the Deputy Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Deputy Commissioner, or upon the expiration of the deadline for doing so. The Deputy Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUES

The issues presented in this case are whether civil penalties are appropriate because:

(1) in contracting to perform work on a home in St. Paul, the Respondents engaged in unlicensed residential building contractor, remodeler, or roofer activity in violation of Minn. Stat. § 326.84, subds. 1 & 1b, and 326.842;

(2) by failing to complete work on the home in St. Paul, the Respondents performed negligently or in breach of contract in violation of Minn. Stat. § 326.91, subd. 1(4);

(3) the Respondents failed to obtain building permits in violation of Minn. Stat. § 326.91, subd. 1(2), and Minn. R. 2891, subp. 1H; and

(4) the Respondents failed to comply with a Cease and Desist Order in violation of Minn. Stat. § 326.91, subd. 1(5).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On June 11, 2002, the Commissioner issued a Cease and Desist Order prohibiting Scott Davis and Joffree Taylor, individually and doing business as J & S Construction, from engaging in the work of residential building contractors, remodelers, and/or roofers in the State of Minnesota without a license pursuant to Minn. Stat. § 326.84. The Cease and Desist Order was served by mail on the Respondents at their business address, which at that time was 3124 - 12th Avenue South, No. 105, Minneapolis, Minnesota 55407. The Respondents received the Cease and Desist Order.^[1]

2. On July 3, 2003, J & S Construction entered into a contract with Joan Thomas to do some work on her home at 939 Dayton Avenue, St. Paul, Minnesota.^[2] The work to be performed under the contract was to remove sheetrock in the basement; clean up mold and fungus; install new sheetrock; mud, tape, sand, prime, and paint the new sheetrock; and other miscellaneous painting in the basement and cleaning of the kitchen cabinets. The contract price was "\$5,000 if no complications occurred but not to exceed \$6,500."^[3]

3. On July 21, 2005, J & S Construction entered into another contract with Joan Thomas to do additional work on her home. The contract called for installation of a shower in the basement, including installing sheetrock and tiling the floor. The contract also provided that Joffrey Taylor and Scott Davis of J & S Construction would "supervise Vincent [Jones] to install plumbing needed to install shower, toilet, and to remount and change out sink in basement bathroom."^[4] The contract price was \$2,825,

which included \$300 for electrical and plumbing work to be performed by Vincent Jones. The work was to be performed by August 1, 2003.^[5] Joan Thomas knew Vincent Jones and had hired him in the past to do unlicensed plumbing and electrical work on other property she owned. She hired Jones to do the electrical and plumbing work involved in installing the basement bathroom and asked J & S Construction to supervise him because she had had problems with Jones in the past not showing up for work.^[6] J & S Construction executed some kind of agreement with Vincent Jones, initialed by Joan Thomas, but Thomas paid Jones directly for the electrical and plumbing work.^[7]

4. On July 28, 2003, J & S Construction and Joan Thomas executed a change order to include removal of commercial tile on the floor and scraping and removal of glue so that other tile could be placed.^[8] The amount of the change order was \$300.00.^[9]

5. On August 22, 2003, J & S Construction and Joan Thomas executed a change order to include painting the ceiling in the kitchen and some additional work in the basement. The amount of the change order was \$100.00.^[10]

6. The Respondents did not obtain building permits for any of the work performed under these contracts.^[11]

7. On August 23, 2003, Joan Thomas left to go on an extended trip out of the state. The work was not completely finished when she left. She did not return until early February 2004. When she returned, she called Taylor to tell him she was back in town and wanted him to complete the work on the basement shower.^[12] She also asked him to install some additional sheetrock in the basement.^[13]

8. The Respondents completed the additional sheetrock in the basement and billed for the change order for this work.^[14] On February 14, 2004, Respondents began laying tile on the shower floor in the basement. The Respondents became concerned that Vincent Jones had not properly installed the plumbing and that it would not meet code requirements. They were also concerned that his electrical work was inadequate because they could see sparks in the wiring he had installed. Joan Thomas told them that she was interviewing other plumbers to correct the plumbing problems, and she asked them to stop laying tile until the plumbing problems were addressed, corrected, and the shower installed properly.^[15] Shortly thereafter, the Respondents called City of St. Paul inspectors to look at the plumbing and electrical work, which made Joan Thomas angry because she did not want inspectors at her home.^[16]

9. When the Respondents returned to continue work on February 25, 2004, Thomas terminated the contracts "as a result of interminable delays, unprofessional conduct in fulfilling the completion of the contracts."^[17] She asked them to immediately remove their tools from the premises. She also called the police to supervise the removal of tools from her home.^[18]

10. The record is unclear how much of the contracted-for work was unfinished when Thomas terminated the contracts. The record suggests that the tile and base trim in the basement bathroom was not completed because of the plumbing problems. Thomas had paid about \$6,930.00^[19] to the Respondents on contracts of \$8,621.00.^[20]

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 45.027, and 326.91.

2. The Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges issued by the Department was proper and the Department has fulfilled all relevant procedural requirements of law and rule.

3. A residential remodeler is a person in the business of contracting or offering to contract with an owner to improve existing residential real estate by providing two or more special skills, as defined by Minn. Stat. § 326.83, subd. 19. Interior finishing, including the installation of tile, is one special skill; drywall and plaster, including installation, taping, finishing, and painting, is another special skill.^[21] Residential remodelers must be licensed by the Department of Commerce.^[22] No person required to be licensed may act or hold themselves out as residential remodelers without a valid license.^[23]

4. The Respondents, doing business as J & S Construction, meet the definition of residential remodelers because they provide two or more special skills—tile and sheetrock. The Respondents engaged in unlicensed remodeler activity in violation of Minn. Stat. § 326.84, subds. 1 & 1b.

5. Minn. Stat. § 326.91, subd. 1(4), provides that the Commissioner may impose a civil penalty if a person has performed negligently or in breach of contract so as to cause injury or harm to the public.

6. The Department has failed to prove that in failing to complete the projects at the Thomas home the Respondents performed negligently or in breach of contract so as to cause injury or harm to the public.

7. Minn. R. 2891.0040, subp. 1H, provides that performing any construction without obtaining applicable local building permits and inspections is considered a fraudulent, deceptive, or dishonest practice, which is prohibited by Minn. Stat. § 326.91, subd. 1(2).

8. The St. Paul Code of Ordinances requires a permit for general construction that is more than maintenance only or a minor alteration, the cost of which is \$500 or less.^[24] The Respondents failed to obtain building permits in connection with

construction performed on the Thomas home, in violation of Minn. Stat. §326.91, subd. 1(2), and Minn. R. 2891.0040, subp. 1H.

9. Minn. Stat. § 326.91, subd. 1(5), provides that the Commissioner may impose a civil penalty if a person has violated or failed to comply with any rule or order

10. The Respondents failed to comply with the Cease and Desist Order issued in June 2001 in violation of Minn. Stat. § 326.91, subd. 1(5).

11. The imposition of disciplinary sanctions would be in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Commerce impose appropriate civil penalties.

Dated: April 8, 2005.

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

The Respondents' main argument is that they could have separately contracted with Thomas to do sheetrock and tile (Davis did the sheetrock, and Taylor did the tile work) without the requirement of a license. This is true. The Respondents do business, however, as J & S Construction; their company performs work in more than one specialty area, and their company accordingly must be licensed. Furthermore, they were informed of the licensure requirement by the terms of the Cease and Desist Order in 2001 and should have known then, if not before, that licensure was required.

The Administrative Law Judge has not concluded, however, that the Respondents' failure to complete the Thomas projects demonstrated negligence or breach of contract that caused harm to the public. The Department did not dispute that Thomas left the state before the work was completed and that the Respondents resumed work on the project when she returned. The delays appear substantially to be attributable to her departure; her desire to charge all materials used for the project on her credit card so she could get frequent flier miles; and her decision to use an unlicensed plumber/electrician with whom she had had problems in the past. The

Respondents acted to protect her interest in calling inspectors to review the plumbing and electrical work and cannot be said to have caused harm to Ms. Thomas.

B.L.N.

^[1] Ex. 1; Testimony of Cindy Claason.

^[2] Ex. 2. at 1-2, 8-9.

^[3] *Id.*

^[4] Ex. 2 at 6-7.

^[5] Ex. 2 at 6.

^[6] Testimony of Joffree Taylor.

^[7] Ex. 2 at 4; Ex. 3 at 3.

^[8] Ex. 2 at 9.

^[9] *Id.* at 4.

^[10] *Id.*

^[11] Testimony of Joffree Taylor.

^[12] Testimony of Joffree Taylor; see *also* Ex. 3 at 4-5 (Thomas was in St. Paul through August 22, 2003).

^[13] Testimony of Joffree Taylor; Ex. 3 at 4.

^[14] Ex. 2 at 5; Ex. 3 at 4.

^[15] Ex. 3 at 5.

^[16] Testimony of Joffree Taylor.

^[17] Ex. 4.

^[18] Testimony of Joffree Taylor.

^[19] Ex. 3.

^[20] Exs. 2 & 3.

^[21] Minn. Stat. § 326.83, subd. 19(d)(6); *id.*, subd. 19(f).

^[22] Minn. Stat. § 326.84, subd. 1.

^[23] *Id.*, subd. 1b.

^[24] St. Paul Code § 33.03(a).